Supreme Court, U.S.
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No. 86-1269

IN THE

Supreme Court Of The United States

October Term, 1986

HENRY NEAL,
Administrator of the Estate of
ROGER F. STROH
Petitioner,

v.

MIDWESTERN DISTRIBUTION, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) Does a conflict exist between the United States Circuit Courts of Appeal involving interpretation of 49 U.S.C. §§ 10927 (a) (1) and 11107 (a)?

(2) Should this Honorable Court review a conflict among United States Circuit Courts of Appeals involving state substantive law questions?

LIST OF CORPORATE AFFILIATIONS

In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, the following is a list of corporate affiliates of Midwestern Distribution, Inc.:

Midwestern Distribution, Inc.
Leaseway Transportation, Inc.
Allstate Insurance Company
Northbrook Insurance Company
Sears, Roebuck & Company
Mission Insurance Company
National Union Insurance Company
Fireman's Fund Insurance Company

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STATEMENT OF THE CASE

This is a wrongful death case brought by the administrator of a deceased truck driver's estate against Midwestern Distribution, Inc. ("Midwestern"), the company which was the lessee of the truck in which the deceased ("Stroh") was killed. Midwestern leased the truck from a corporation, Tractor 6540, Inc., and Stroh was one of two truck drivers who were alternating the driving duties for Tractor 6540. Petitioner's theory of lia-

bility against Midwestern is that 49 U.S.C. §§ 10927 (a) (1) and 11107 (4) and the implementing regulation of the Interstate Commerce Commission place the responsibility for Stroh's death on the lessee carrier, Midwestern.

The district court held, and the Eleventh Circuit affirmed, that the statutory scheme in question is intended to protect only "members of the public," and Stroh, as an employee of the lessor and a "statutory employee" of Midwestern, does not fall within the protected class of "members of the public." Consequently, summary judgment was entered and later affirmed in favor of Midwestern because the aforesaid federal statutes did not create a cause of action for Stroh and state worker's compensation law barred any other possible cause of action in tort.

SUMMARY OF THE ARGUMENT

Petitioner brought this tort action based on a theory of liability grounded in Interstate Commerce Commission regulations. Undoubtedly, those federal statutes and regulations create a cause of action only for "members of the public." These statutory laws were intended to destroy independent contractor status for lessors of trucks engaged in interstate commerce so that an injured *member of the public* could recover for his injuries from the more financially stable lessee carriers. Petitioner argues that these regulations also apply to *drivers* employed by the lessor so as to allow those drivers to recover for their injuries against the lessee carriers. This argument is made even though there is no dispute that the driver is also a "statutory employee" of the lessee carrier.

It is the respondent's position that such broadening of the statutory regulations was not intended by the Interstate Commerce Commission or by Congress. As federal law does not create a cause of action for Petitioner, any available cause of action is controlled by state law and does not justify review by this Honorable Court.

REASONS FOR DENYING THE WRIT

I. No Conflict Exists Between The United States Courts of Appeal Involving Interpretation of 49 U.S.C. §§ 10927(a)(1) and 11107(4).

Petitioner asserts that a "conflict" exists between the United States Courts of Appeal for the Fourth, Fifth, and Eleventh Circuits involving the interpretation of 49 U.S.C. §§ 10927 (a) (1) and 11107 (4) and the statutes' implementing regulation. The asserted "conflict" is artificially created by Petitioner's misinterpretation of the cases and misguided reliance on dictum within those cases. The alleged "conflict" does not constitute a genuine conflict among circuits so as to justify this Court's granting of certiorari.

The Eleventh Circuit's underlying holding in this case is that the aforecited federal statutes do not create a cause of action for Stroh because he was a statutory employee of Midwestern, and therefore was not within the protected "member of the public" class. This is the key issue for the resolution of the merits of this case; i.e., whether a "statutory employee" of a lessee carrier is a "member of the public" entitled to protection under the federal statutes.

The Eleventh Circuit's holding that the federal statutes in question do not supply Stroh with a cause of action echoes the precise holding of *White v. Excalibur Insurance Co.*, 599 F.2d 50 (5th Cir.), cert. denied 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979). Pursuant to the case of *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), *White* is binding precedent in the Eleventh Circuit for the case at hand. The Eleventh Circuit correctly analyzed, followed, and applied *White* to the present case.

Petitioner argues that three cases conflict with *White* and with the Eleventh Circuit's holding in the present case. As the following discussion shows, none of these cases create a genuine conflict worthy of this Court's review.

First, Petitioner argues that *Riddle v. Trans-Cold Export, Inc.*, 530 F.Supp. 186 (S.D. Ill. 1982), conflicts with the pres-

ent holding and therefore, that conflict exists between the Eleventh and Seventh Circuits (although this issue has never been heard by the Seventh Circuit Court of Appeals). The Illinois district court in *Riddle* noted that the I.C.C. statutes in question require a plaintiff to be a "member of the general public" before such an action can be brought against the lessee for the lessor's negligence. 530 F.Supp. at 189. The court, citing and following the Fifth Circuit in *White v. Excalibur Ins. Co.*, supra, found that the plaintiff, a co-driver of a truck, was not a member of the general public and granted the lessee carrier's Motion for Summary Judgment.

Plainly, the Illinois district court — which Petitioner contends represents the whole Seventh Circuit — followed *White* and is in complete accord with the precise holding below. A single footnote in *Riddle* shows a disagreement with *White* concerning available state law remedies, but that point of disagreement is not on the merits of the federal issue involved herein. The true holding of *Riddle* completely supports the present holding of the Eleventh Circuit and presents no conflict among the circuits.

Second, Petitioner argues that *Bryant v. Refrigerated Transport Co.*, 418 So.2d 281 (Fla. Dist. Ct. App. 1982) conflicts with the present holding. Therefore, the Petitioner argues there is a conflict among the courts within the Eleventh Circuit. This argument is completely meritless. In *Bryant*, a Florida state intermediate appellate court allowed an action by the estate of a deceased truck driver to proceed against the lessee carrier based on several unique factors. There was no employment contract, express or implied, between Bryant and the lessee, and, most importantly, there existed an express contractual agreement between the lessor and the lessee that Bryant was not an employee of the lessee. Based on these facts, the Florida court found that Bryant was not an employee — statutory or otherwise — of the lessee and was in effect a complete stranger to the lessee. The fact situation in *Bryant* is clearly distinguishable from the present case in which Midwestern had exclusive control over the actions of Stroh and his co-driver.

Therefore, there is no merit to Petitioner's argument that there is a conflict among the courts in the Eleventh Circuit concerning this issue. See, e.g., *Garrett v. Superior Trucking Co.*, 162 Ga. App. 558, 290 S.E.2d 528 (1982).

Petitioner next argues that *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 80 (4th Cir. 1974), conflicts with the present holding by the Eleventh Circuit. At first glance, it appears that a conflict does exist. However, a closer study of *Proctor* and more recent cases reveals that there is no conflict worthy of this Court's review.

Proctor was decided in 1974, several years before the other cases discussed herein which support the present holding. *Proctor* held that a co-driver of a leased truck was a stranger to the lessee carrier just as a member of the public and, consequently, the lessee was responsible for the co-driver's injuries.

However, in November of 1975, this Honorable Court in effect altered that part of the *Proctor* decision by holding that a driver for the lessor was not a member of the public within the protection of the Interstate Commerce Commission regulatory statutes. *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 39, 96 S.Ct. 229, 46 L.Ed.2d 169, 178 (1974) ("[T]he lease did not affect this basic responsibility of the lessee to the public; it affected only the relationship between the lessee and the lessor."). While not expressly overruling *Proctor*, it certainly altered the holding so as to change its effect on the present case. Furthermore, *Transamerican* did overrule *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972), which was a primary case relied on in the *Proctor* decision. See, *Proctor*, 494 F.2d at 92.

The effect of the *Proctor* decision was so altered by *Transamerican* as to dissipate any conflict which may have existed. The Fifth Circuit specifically rejected *Proctor* after *Transamerican* and no Circuit Court of Appeals has ever followed the *Proctor* rationale (See *White*, 599 F.2d at 55-56). On the other hand, the *White* decision was completely followed by the Fifth Circuit's recent decision in *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984). This Honorable Court has denied

certiorari once on this issue, *White,* supra, and should do so again in the present case.

II. Any Conflict Among the Circuits Concerns State Substantive Law Questions and Does Not Justify This Court's Review.

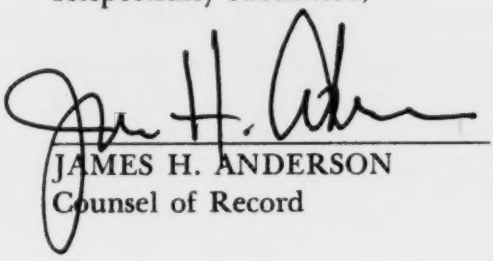
Pursuant to the above argument, no right of action was created for Stroh by the Interstate Commerce Commission regulatory statutes. Consequently, any remedy available to Stroh is governed by state law schemes governing employees and their right to worker's compensation benefits. Each state may have its own rule relating to whether a person classified as a "statutory employee" is covered by that state's worker's compensation laws without invoking this Court's review. Most states have an "exclusivity" provision in their worker's compensation statutes barring other tort actions and it is up to each of those states to interpret their state statutes. The *Proctor* court interpreted South Carolina's worker's compensation scheme to not bar a common law negligence action by a statutory employee, while the *White* court and the Eleventh Circuit court in the present case interpreted different state statutes to bar a common law negligence action for a statutory employee.

If a "conflict" indeed exists between the cases asserted by Petitioner, it is a conflict among the applications of state substantive law worker's compensation remedies. Such a conflict does not justify this Court's granting of certiorari. *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206, 58 S.Ct. 860, 862, 82 L.Ed. 1290, 1292 (1983) (A difference in opinion as to state law questions is not a reason for granting certiorari.).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James H. Anderson, a member of the Bar of the Supreme Court of the United States and the Attorney for Midwestern Distribution, Inc., do hereby certify that I have served a copy of the foregoing upon all counsel of record in this cause by placing same in the United States Mail, postage prepaid, this the 2nd day of March, 1987, addressed as follows:

Allen W. Howell
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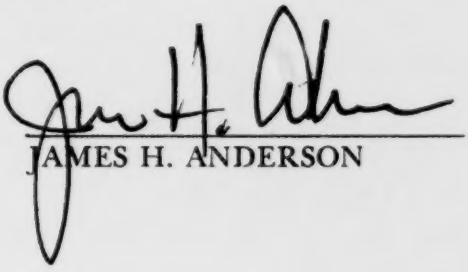

JAMES H. ANDERSON